IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

MARK NEWBY, ET AL.,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	CIVIL ACTION NO. H-01-3624
	§	AND CONSOLIDATED CASES
ENRON CORPORATION, ET AL.,	§	
	§	
Defendants.	§	

RESPONSE OF DEFENDANT MICHAEL J. KOPPER TO MOTION TO REMAND BY *DELGADO* AND *PEARSON* PLAINTIFFS

THE HONORABLE JUDGE OF THIS COURT:

NOW COMES Defendant Michael J. Kopper ("Kopper") and files this response in opposition to the motions to remand filed by the plaintiffs in *Pearson, et al. v. Fastow, et al.*, Civil Action No. H-02-0670, and in *Delgado, et al v. Fastow, et al.*, Civil Action No. H-02-0673.[1] *Pearson* and *Delgado* are consolidated into the above-captioned case number, after having been originally filed under Cause No. 2002-00609 and 2002-00569, respectively, in Harris County District Court and removed to this Court. In support of his opposition to the motions to remand, Kopper would respectfully show the Court as follows:

[1]As part of the consolidated *Newby* proceedings, *Pearson* and *Delgado* are subject to the Court's previous orders applicable to the *Newby* cases, including but not limited to the Court's placement of a hold on the filing of responsive pleadings pending the Court's entry of a scheduling order for the consolidated cases. Accordingly, Kopper's response to these motions to remand is filed without prejudice to his ability to file any necessary responsive pleadings, including but not limited to a motion to dismiss under FED. R. CIV. P. 12(b), at the appropriate time.

I. Lawsuits Filed by Fleming & Associates Seek to Circumvent Federal Securities Laws

1. The *Pearson* and *Delgado* Plaintiffs are represented by Fleming & Associates, L.L.P. ("Fleming"). Fleming has filed at least five additional Enron-related lawsuits[2] ("the Fleming lawsuits") in five different forums. The factual allegations in each Fleming lawsuit are virtually identical. All of these cases have been removed to federal court. Kopper is named as a defendant in a number of the Fleming lawsuits, including *Pearson* and *Delgado*.

2. None of the plaintiffs in *Delgado* or *Pearson* have alleged that they reside in Harris County. One of the Plaintiffs admits that he is a resident of Alabama.

3. Sean Jez, a partner at Fleming, has represented to this Court that Fleming represents over 750 individuals. Transcript of January 30, 2002 hearing at 17-18. During a January 30 hearing before this Court, Mr. Jez acknowledged that Fleming might well continue to file additional Enron-related lawsuits. *Id.* at 50-51. Approximately one week later, Fleming filed the *Jose* lawsuit in Bexar County and successfully sought an *ex parte* temporary restraining order against selected defendants. It appears that approximately 80 of Fleming's claimed 750 clients have had a suit filed under their name to date.

4. On February 23, 2002, Arthur Anderson removed the *Pearson* case to this Court pursuant to the Securities Litigation Uniform Standards Act ("SLUSA"). Pub. L. 105-353, 112

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[2] *Odam v. Enron Corporation,* Civil Action No. H-01-3914, filed in the United States District Court for the Southern District of Texas, Houston Division; *Rosen v. Arthur Andersen, L.L.P.,* originally filed under Cause No. 2001-57517 in the 333rd Judicial District Court of Harris County, Texas; *Bullock v. Arthur Anderson, L.L.P.,* Cause No. 32716, originally filed in the 21st Judicial District Court of Washington County, Texas; *Jose v. Arthur Andersen, L.L.P.*; originally filed under Cause No. 2002-CI-01906 in the 57th Judicial District Court of Bexar County, Texas; and *Ahlich v. Arthur Andersen, L.L.P.*, originally filed under Cause No. 02-000073-CV-272, in the District Court for Brazos County, Texas.

STAT. 3227 (1998). Based upon the same legal authority, Arthur Andersen removed the *Delgado* case to this Court on February 25, 2002.

II. Relevant Statutory Provisions

5. SLUSA was passed in 1998 in an attempt to strengthen the reforms begun by Congress in 1995 with the passage of the Private Securities Litigation Reform Act ("Reform Act"). Pub. L. 104-67, 109 STAT. 737 (1995). The Reform Act attempted to reduce the number and expense of frivolous security fraud class action lawsuits by, among other things, establishing heightened pleading requirements, imposing an automatic stay on discovery until the pleadings comport to the pleading requirements, and providing a safe harbor for certain forward-looking statements. SLUSA was passed in 1998 "to prevent certain State private securities class action lawsuits alleging fraud . . . from being used to frustrate the objectives of [the Reform Act]." SLUSA, Pub. L. 105-353, at § 2(5).

6. To this end, SLUSA requires the removal to federal court of "[a]ny covered class action brought in any State court involving a covered security" and the dismissal of "covered class action[s] based upon the statutory or common law of any State [that] alleg[es] a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. §§ 77p(b) & (c); 78bb(f)(1)(A) & (2). The statute defines a "covered class action" as

> (i) any single lawsuit in which –
>
> (I) damages are sought on behalf of more than 50 persons or prospective class members, and questions of law or fact common to those persons..., without reference to issues of individualized reliance on an alleged misstatement or omission, predominate over any questions affecting only individual persons or members; or
>
> ...
>
> (ii) any group of lawsuits filed in or pending in the same court and involving common questions of law or fact, in which ---

(I) damages are sought on behalf of more than 50 persons; and
(II) the lawsuits are joined, consolidated, or otherwise proceed as a single action for any purpose.

15 U.S.C. §§ 77p(f)(2)(A); 78bb(f)(5)(B). As noted by this Court, Congress, through the passage of the Reform Act and SLUSA, has preempted all state law security actions falling within these parameters. Memorandum & Order entered February 6, 2002 (Dkt. No. 279), at 12. As the Senate Banking Committee explained:

> [W]hile the Committee believes it has effectively reached those [State] actions that could be used to circumvent the reforms enacted by Congress in 1995 as part of [the Reform Act], *it remains the Committee's intent that the bill be interpreted broadly to reach mass actions and all other procedural devices that might be used to circumvent the class action definition.*

S. Rep. No. 105-182, at 8 (1998) (emphasis added).

III. *Pearson* and *Delgado* Cases were Properly Removed to Federal Court: This Court Should Disregard The Fleming Plaintiffs' Procedural Maneuvers That Seek to Eviscerate the Protections of SLUSA

7. The *Pearson* and *Delgado* Plaintiffs argue that the removal of their cases was improper under the SLUSA and should, therefore, be remanded to the state court. They claim that their lawsuit does not qualify as a "covered class action." They have not challenged (and cannot challenge) the remaining requirements for removal under SLUSA.

8. To remand the case would permit Fleming and the 750 plaintiffs it represents[3] to circumvent the protections provided by the Reform Act and SLUSA to the nation's securities market by employing the procedural device of filing numerous lawsuits (using identical

[3]The artifice of Fleming's approach is made plain by the fact that Fleming owes fiduciary duties to all 750 or more its clients. One aspect of this fiduciary duty is to treat all of these clients equally – that is, not to put the interests of any artificial grouping of less than 50 Fleming clients before those of other Fleming clients. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06. Any effort to prosecute the claims of an artificial grouping of less than the whole of Fleming's client base, to the detriment of the remainder, would place Fleming in a conflict. This Court may fairly presume that Fleming seeks to avoid such a conflict by prosecuting all of its clients' claims concurrently, notwithstanding that it may name less than 50 in a particular filing.

allegations) in numerous courts, each allegedly raising "state law" causes of action on behalf of an artificially small number of named plaintiffs. As this Court has previously noted, "[c]learly, SLUSA was enacted to prevent just such gamesmanship." Order & Memorandum (dated Feb. 15, 2002) at 4. The Court should not permit this abuse to continue unchecked.

9. Fleming argues that its cases are "private, individual actions" not covered by SLUSA. However, the record before this Court clearly establishes Fleming's cases are simply procedural manipulations designed to conceal Fleming's attempted mass actions — and SLUSA is intended to apply to all mass actions. A California federal district court recently faced a similar attempt by a plaintiff to undermine the effectiveness of the securities laws through procedural manipulation of pleadings. *Gibson v. PS Group Holdings, Inc.*, Fed. Sec. L. Rep. ¶ 90,921, 2000 WL 777818 (S.D. Cal. 2000). In that case, "[t]he procedural history of th[e] case suggests that Plaintiff selectively omitted the damages prayer from his Amended Complaint to defeat removal under [SLUSA]." *Id.* at *3. When the plaintiff then sought to remand the case to state court, alleging that it fell outside the definition of a "covered class action," the court refused to remand the case as doing so "would eviscerate" SLUSA. *Id.*

> A rule that allows a plaintiff to defeat a defendant's right to remove a class action through ... a hollow procedural maneuver would surrender [SLUSA's] application to the class action plaintiffs the statute seeks to keep at bay. *[SLUSA] demands that the Court look beyond the face of the [plaintiff's] pleadings to discern whether this action is a "covered class action."* Because Plaintiff has offered no explanation [for his procedural actions], the Court finds no reason why this action should not qualify as a "covered class action" under [SLUSA.]

Id. at *4 (emphasis added).

10. The procedural history and arbitrary number of plaintiffs assigned to each of the Fleming lawsuits suggest that Fleming is attempting to circumvent the class action definition through the mechanism of filing numerous lawsuits in numerous counties with arbitrary division

of plaintiffs among the lawsuits. As this Court discussed in an earlier ruling, this artful pleading doctrine applies where federal law preempts the field and prevents plaintiffs from precluding removal by failing to plead necessary federal questions. Memorandum & Order, entered February 6, 2002 (Dkt. No. 279), at 9. Because Congress has preempted securities fraud actions such as those pled in the Fleming Lawsuits, the artful pleading doctrine applies and prohibits subsets of the alleged 750 Fleming clients from precluding removal of their claims. Allowing Fleming to avoid the provisions of SLUSA and the Reform Act through such creative pleadings would eviscerate the protections provided by those laws. As a result, Kopper respectively requests that this Court deny the Fleming Plaintiffs' motion to remand.

11. Federal courts have traditionally scrutinized the structure of plaintiffs' lawsuits to ensure that plaintiffs do not thwart federal jurisdiction through the use of procedural maneuvers. According to the Supreme Court, "[a] district court can consider whether the plaintiff has engaged in any manipulative tactics when it decides whether to remand a case." *Carnegie-Mellon Univ. v. Cohill,* 108 S. Ct. 614, 622 (1988) (question of whether to remand pendant state-law claims). For example, the federal courts have ruled that the fraudulent joinder of a nondiverse defendant will not stymie the removal of the case to federal court or the federal court's exercise of jurisdiction. *See, e.g., Triggs v. John Crump Toyota, Inc.,* 154 F.3d 1284, 1287 (11th Cir. 1998) ("Fraudulent joinder is a judicially created doctrine that provides an exception to the requirement of complete diversity.")

12. In its February 15, 2002 Order and Memorandum (Dkt. No. 296), this Court quoted *Winkler v. Eli Lilly & Co.,* 101 F.3d 1196, 1202 (7th Cir. 1997): "Litigants who engage in forum-shopping, or otherwise take advantage of our dual court system for the specific purpose of evading the authority of a federal court, have the potential 'to seriously impair the federal

court's flexibility and authority to decide that case'" (citations omitted). The actions of Fleming seek to destroy the safeguards provided by the Reform Act and SLUSA and interfere with this Court's ability to manage the massive Enron-related litigation before it. It is appropriate under the circumstances of this case for the Court to retain jurisdiction and deny Plaintiffs' motion to remand.[4]

IV. Because Fleming Plaintiffs' Claims Arise Under Federal Law, Removal is Proper

13. Plaintiffs acknowledge that their cases will be held to arise under federal law (and be properly removable) if federal law creates their causes of action or if the relief they seek is necessarily dependent upon resolution of substantial questions of federal law. *See, e.g.,* Memorandum in Support of Motion to Remand filed by *Delgado* Plaintiffs at 4. Because Fleming Plaintiffs seek to recover insider trading profits, which are not a proper measure of damages under Texas law, and rely on fraud-on-the-market theory, which is not recognized by Texas law, their claims, in fact, arise under federal law and have been properly removed. Kopper understands that other defendants are addressing the federal nature of Plaintiffs' claims, and joins in that briefing.

V. Procedure Following Removal

14. The Court has previously enforced the SLUSA provision requiring dismissal of a "covered class action based upon the statutory or common law of any state ... [brought] by any private party alleging ... (A) a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security; or (B) that the defendant used or employed any

[4]Furthermore, as a practical matter, even if a particular suit filed by Fleming has technically fewer than 50 named plaintiffs, the artifice of the Fleming approach would eventually be exposed in state court through consolidation under the application of the Texas Rules of Judicial Administration. Kopper understands that other defendants are addressing the potential application of these rules, and joins in that briefing.

manipulative or deceptive device or contrivance in connection with the purchase or sale of a covered security." 15 U.S.C. § 78bb(f)(1)(A) & (B). The claims raised by the *Pearson* and *Delgado* Plaintiffs clearly fall within this definition. As this Court has previously held "dismissal with prejudice of claims within [the] ambit [of SLUSA] is in keeping with the language of 15 U.S.C. § 78bb(f)." Memorandum & Order, entered on Feb. 6, 2002 (Dkt. No. 279), at 21-22.

15. To the extent this Court determines that any of the claims raised by these Plaintiffs fall outside of this group, the Court has recognized that it may exercise supplemental jurisdiction over such claims pursuant to 28 U.S.C. § 1367. The analysis used by this Court in connection with the motion to remand filed by plaintiffs William Coy and Candy Mounter is equally applicable to the *Pearson* and *Delgado* lawsuits. This Court held that

> [a]ll related Enron cases currently consolidated before this Court basically allege a fraudulent scheme by Enron, aided by Arthur Andersen, L.L.P., with claims based on the same conduct, arising from the same nucleus of operative fact, resulting in a strong nexus between federal and state claims that supports federal jurisdiction here.

Memorandum & Order, entered Feb. 6, 2002 (Dkt. No. 279), at 23. This Court recognized that a remand of the claims raised by Coy and Mounter could lead to "unwieldy problems regarding coordination of discovery between the federal and state cases." *Id. (*quoting *In re Lutheran Brotherhood Variable Insurance Products Co. Sales Practices Litigation,* 105 F. Supp. 2d 1036, 1042 (D. Minn. 2000)). The same dangers are present in the *Pearson* and *Delgado* lawsuits.

Conclusion

WHEREFORE, PREMISES CONSIDERED, Defendant Michael J. Kopper respectfully requests that this Court deny the Fleming Plaintiffs' motions to remand.

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This pleading was served in compliance with the Rules 5b of the Federal Rules of Civil Procedure on April 1, 2002, by certified mail, return receipt requested or U.S. Mail to all counsel on the attached Service List.

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Eric J.R. Nichols